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No. 85-2102

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

MONTAUK-CARIBBEAN AIRWAYS, INC.,
d/b/a LONG ISLAND AIRLINES,
Petitioner,

v.

JUDITH HOPE, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE REGIONAL AIRLINE ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Regional Airline Association ("the RAA") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of petitioner has been obtained and filed with the Court. The consent of the several respondents was requested but refused.

The RAA is the trade association of the regional/commuter air carrier industry. The RAA represents a substantial segment of that industry, and the regional/commuter carriers are a substantial part of the national air transportation system. Regional/commuter air carriers are carriers which operate primarily with aircraft of 60 seats or fewer or 18,000 pounds payload or less. The RAA has 76 air carrier members whose operations constitute substantially more than 50 percent of the revenue passenger miles operated by this class of carrier in 1985. In 1985, the regional/commuter carrier industry

served 854 airports in the United States and carried over 27.3 million passengers. Petitioner is an air carrier member of the RAA.[1]

The RAA's air carrier members have a substantial interest in the decision rendered by the Second Circuit, specifically the issues of Federal preemption and private actions with respect to the Federal aviation laws, the underlying interstate commerce and Federal supremacy constitutional issues, and whether violations of the Federal aviation laws are cognizable under 42 U.S.C. § 1983 (1982 and Supp. 1984). Those issues are immediately relevant to the disposition of this case.

The Second Circuit's decision, when viewed in its proper and complete context, touches upon the core relationship among air carriers, airports and the Federal Government in the operation and management of the national air transportation system. The decision would significantly expand the scope of airport operators' proprietary powers and rights that are not preempted by Federal law, to the detriment of a sound national air transportation system and the Federal Government's administration of the airways. In short, the decision permits airports, by virtue of their proprietary powers, to maintain exclusive use rights for airport facilities, to discriminate unjustly among air carriers and to regulate the rates, routes and services of air carriers. The adverse effects of those developments on the RAA's members, and the national air transportation system, are apparent. Furthermore, the Court of Appeals decision limits the ability of air carriers to seek relief in Federal court from an airport's violations of Federal statutory requirements. The regional/commuter airlines have a clear and vital interest in each of these important Federal matters.

The RAA has consistently advocated fair and nondiscriminatory access for all air carriers to airports and

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[1] The RAA was not a party to this action in the lower courts.

airport facilities, and it has been a strong proponent of Federal supervision of airport access restrictions, consistent with airport operators' proprietary powers and rights and the interests of communities surrounding airports.

The RAA's members have an obvious interest in maintaining fair and non-discriminatory access to airports. As air carriers, they have a vital stake in the free flow of interstate commerce and the national air transportation policy that air carriers, in response to market forces, determine rates, routes and services unfettered by local regulation. Interstate air commerce will be severely burdened, and the national air transportation policy frustrated, unless all air carriers have non-discriminatory access to airports and airport facilities and the Federal prohibitions against exclusive use rights and unjust discrimination are applied in a uniform manner at airports throughout the Nation.

As the representative of a major segment of the air carrier industry, the RAA would bring to this proceeding an interest broader than that represented by the parties. Additionally, the RAA has greater familiarity with the national significance of the Second Circuit's decision and how it will impact upon the air carrier industry and the national air transportation system. Finally, the RAA has a substantial background in Federal aviation law and airport access restriction matters. The RAA has represented its members before the United States Department of Transportation and its constituent agency, the Federal Aviation Administration, as well as participated in Federal court litigation concerning preemption under the Federal aviation laws, discriminatory treatment of air carriers and airport access restrictions, precisely the matters raised here.[2]

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[2] The RAA has propounded two additional Questions Presented so that the issues pertinent to the administartion of the Federal aviation laws might be raised directly. The RAA's Questions

Respectfully submitted,

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Presented, which are fairly encompassed in Questions Nos. 1 and 3 propounded by petitioner, are raised in addition to petitioner's questions.

QUESTIONS PRESENTED

Petitioner alleges that the Town of East Hampton, New York, acting under color of state statute, refuses to terminate exclusive lease arrangements with an air carrier at its municipally-owned, federally-funded airport, thereby discriminating against petitioner's air carrier services, precluding petitioner from providing passenger and aircraft support necessary for successful air carrier operations at the airport, and placing petitioner's services at a competitive disadvantage. The Court of Appeals held, in part, that the Town's refusal to end the exclusive lease arrangements is a valid exercise of its proprietary powers and rights under the state statute and is not preempted by federal law.

1. Are proprietary powers and rights recognized under Section 105(b)(1) of the Federal Aviation Act preempted by Section 105(a)(1) of that Act if those powers and rights are exercised in a manner which relates to, or affects, the rates, routes or services of an air carrier?

2. May the Town's refusal to terminate its exclusive lease arrangements be recognized under Section 105(b)(1) of the Federal Aviation Act as a lawful exercise of proprietary powers or rights, and may New York law authorize such exclusive lease arrangements at a federally-funded airport, when Section 308(a) of the Federal Aviation Act, and Section 511(a) of the Airport and Airway Improvement Act of 1982, bar exclusive use rights and unjust discrimination against air carriers at any federally-funded airport?

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Respondents.

BRIEF *AMICUS CURIAE* OF THE REGIONAL AIRLINE ASSOCIATION

The Regional Airline Association ("the RAA") respectfully submits this brief *amicus curiae* in support of petitioner's request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-titled proceeding on February 14, 1986.

INTEREST OF THE *AMICUS CURIAE*

As discussed in the foregoing motion for leave to file this brief, the RAA is the trade association of the regional/commuter air carrier industry. That the RAA's members could be adversely affected by the Court of Appeals decision is apparent. That decision holds, in part, that a municipally-owned airport may, pursuant to state statute, refuse to terminate exclusive lease arrangements that discriminate against an airline and deny that airline access to support necessary for its air carrier operations, notwithstanding Federal law directly to the contrary. Second, the decision holds that such conduct is not preempted by Federal law even though it may directly relate to the rates, routes or services of air carriers, an area

specifically preempted by Federal aviation law. Third, the decision precludes private actions by air carriers seeking relief from such conduct under the Federal aviation and civil rights laws. Such holdings impact upon the vital interests of all air carriers.

The effects of the decision will be felt immediately in the Second Circuit, which includes major municipally-owned airports, as those airports use their vastly expanded proprietor rights to control the rates, routes or services of carriers and to grant preferred carriers exclusive use rights to airports and airport facilities. Undoubtedly, the decision will soon be relied upon by municipally-owned airports throughout the Nation as authority for a radical expansion of their proprietary powers and rights, crippling the free market basis of airline deregulation and the ability of the Federal Government to maintain access to the airways. At the same time, the decision precludes private actions, so that Federal court relief from improper airport conduct would be unavailable to carriers at the time of greatest need. Accordingly, the Second Circuit's decision is directly inimical to the interests of the RAA's air carrier members and the traveling public.[1]

STATEMENT OF THE CASE

Petitioner Montauk-Caribbean Airways, Inc., d/b/a Long Island Airlines ("MCA"), seeks a writ of certiorari with respect to a decision of the United States Court of Appeals for the Second Circuit. That decision affirmed a dismissal by the United States District Court for the Eastern District of New York, pursuant to Fed. R. Civ. P. 12(b)(6), of petitioner's Complaint which alleged that it had been denied access to East Hampton Airport, New York ("the Airport"), in violation of the Federal avia-

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[1] The RAA's interest is limited to the Federal aviation issues discussed above. It does not present any view with respect to the merits of the contract dispute between the parties, and does not address the antitrust issues except as they relate to the Federal aviation issues.

tion, antitrust and civil rights laws.[2] The Court of Appeals decision is reported at 784 F.2d 91 (2nd Cir. 1986), and is provided at Appendix D of petitioner's brief.

MCA is an air carrier that has served the Airport since the 1960s. The Airport is owned and operated by the Town of East Hampton, New York ("the Town"). East Hampton Aire, Inc. ("EHA") is the only other air carrier serving the Airport.

In addition to its air carrier services, MCA is also a fixed base operator ("FBO") at the Airport. An FBO, analagous to an automobile service station, provides fuel, oil, maintenance, aircraft parking and tiedowns and similar aircraft-related services to the aircraft operating public.[3] An air carrier can, of course, fuel and service its own aircraft at an airport, or purchase fuel and aircraft-related services from an FBO.[4]

It should also be appreciated that an air carrier's services include not only flight operations (*i.e.*, landings and take-offs), but also passenger-related services at the terminal, such as ticketing, passenger and baggage handling, and providing counter space.[5] At most airports, the passenger-related services are operated completely separate from the FBO operations. For obvious competitive reasons, most air carriers insist on the right to provide their own passenger-related services at the terminal.[6]

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[2] Because the trial court granted respondents' motion to dismiss, the record concerning petitioner's allegations was not developed. Accordingly, the RAA's statements concerning the facts of this case are necessarily based on the Complaint, and any reasonable inferences therefrom, or factual statements by petitioner in its brief that are supported by the lower courts' opinions.

[3] *Pinehurst Airlines, Inc. v. Resort Air Services, Inc.*, 476 F. Supp. 543, 548 n.1 (M.D.N.C. 1979).

[4] Section 511(a)(1)(C) of the Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, 96 Stat. 671 ("the AAIA"), 49 U.S.C. App. § 2210(a)(1)(C) (1982 and Supp. 1984).

[5] *Airline Deregulation and Airport Regulation*, 93 Yale L.J. 319, 325 n.44 (1983) ("*Airline Deregulation*").

[6] *See id.* at 332-34.

Those services are usually provided in terminal space leased from the airport or subleased from other carriers.[7]

MCA operated a year-round FBO at the airport until 1979, when it reached a new FBO agreement with the Town, for a 10-year term that ends in 1989.[8] That agreement required MCA to provide FBO services at the Airport only during the period May through September of each year, which represents the five summer months that constitute the high summer season at the Town. From 1980 through 1982, MCA, apparently of its own volition, limited its regular air carrier services to the Airport to the five summer months.

In 1983, MCA sought to continue its air carrier services (including its passenger-related services and servicing its own aircraft) and FBO operations after the end of the five-month summer season. The Town refused and even prohibited MCA from conducting passenger flight operations (*i.e.*, landings and take-offs) at the Airport during the seven-month off-season.[9] In short, the Town refused to acknowledge MCA's claimed right to conduct year-round air carrier and FBO operations, and refused to extend or amend MCA's five-month lease, despite the fact that EHA, the other air carrier serving the Airport, had a year-round lease permitting it to provide such services. Essentially the same developments occurred at the end of the 1984 summer season.

In February 1985, MCA brought suit in the Eastern District against respondents because MCA had not been permitted to serve the airport during the 1984-85 off-season. Because of the ongoing litigation, at the end of the 1985 summer reason the parties stipulated that MCA

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[7] *See Airport Access Task Force, Report and Recommendations of the Airport Access Task Force* 50 (presented to Congress on March 10, 1982) (study conducted pursuant to Section 527 of the AAIA, 49 U.S.C. App. § 2226).

[8] Petitioner's brief at 3a-4a (Appendix A, para. 14).

[9] Petitioner's brief at 4a-5a (Appendix A, paras. 16, 20 and 23); *see* petitioner's brief at 4.

could continue its air carrier operations and service its own aircraft until mid-November, although MCA's FBO operations for other carriers was not permitted. In November 1985, the Town refused to renew the stipulation, and MCA obtained an injunction from the Second Circuit barring the Town from terminating MCA's activities at the Airport. That injunction was lifted by the Second Circuit, however, on February 14, 1986, thus permitting the Town to terminate MCA's off-season services at the Airport.[10]

Armed with the Second Circuit's decision, the Town intends to return to its prior practice and prohibit MCA from handling its own ticketing, passenger and baggage handling, counter space and similar passenger-related services at the Airport at the conclusion of the summer season.[11] By contrast, EHA is permitted to handle such services for itself and other air carriers, and MCA would be required to rely upon EHA, its sole air carrier competitor at the Airport, for those passenger services.[12] Furthermore, the Town intends to prohibit MCA from providing its own fuel, maintenance and similar aircraft-related services for its aircraft during the off-season; similarly, MCA would not be permitted to provide FBO services to others during the off-season.[13] Again, by contrast, EHA is permitted to operate its FBO year-round and MCA would be required to rely upon EHA's FBO

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[10] In November 1985, the Town conceded that MCA could conduct air carrier flight landings and take-offs at the Airport during the off-season, but has not conceded that it may do any more than that during the off-season.

[11] Petitioner's brief at 4-5. During the current summer season, MCA may operate pursuant to its 10-year lease. At the end of the summer season, however, the Town has indicated that it will again prohibit MCA's activity at the airport (except landings and take-offs).

[12] *Id.*

[13] *Id.*

for fuel and aircraft-related services during the off-season.[14]

The core of the instant dispute, then, is the Town's refusal to acknowledge or extend MCA's lease so that it can provide its own passenger and aircraft-related services at the Airport year-round. Because the Town permits EHA to operate similar passenger and aircraft-related services year-round for itself and other air carriers, MCA alleges that the Town has granted EHA exclusive lease or use arrangements during the off-season, has discriminated and will again discriminate against MCA, and has regulated and will regulate MCA's rates, routes or services by preventing it from handling its own passenger services, by preventing it from servicing its own aircraft and by competitively disadvantaging MCA's operations with the requirement to use a competitor's FBO services. Significantly, the Federal Aviation Administration ("the FAA") has issued a preliminary order finding the Town's conduct to be in violation of Federal law.[15]

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Decision Raises Important Federal Matters, Conflicts In Principle With Other Circuits and Will Have a Major Adverse Impact on the National Air Transportation System.

This case presents important and recurring Federal questions of the extent to which the proprietary powers and rights of municipally-owned airports are preempted by the Federal aviation laws.[16] Presented also is the im-

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[14] *Id.*

[15] Petitioner's brief at 53a (Appendix H).

[16] For example, the issue of Federal preemption of state law in the context of Federal aviation law and international air transportation was recently addressed by the Court in *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 54 U.S.L.W. 4687 (U.S. decided June 18, 1986), in which this Court held that a Florida tax on aviation fuel sold to foreign air carriers is not preempted by the Federal

portant Federal matter of whether an air carrier may bring an action under 42 U.S.C. § 1983, or under the Federal aviation laws, for violations of the Federal aviation laws by municipally-owned airports.

The holdings of the Second Circuit in this case that municipally-owned airports, in the exercise of their proprietary powers and rights pursuant to state statute, may (1) enter exclusive lease arrangements for the use of federally-funded airports, (2) discriminate against certain air carriers in the providing of facilities and services, and (3) prevent carriers from providing passenger services and from servicing their own aircraft, thereby regulating rates, routes or services of air carriers, are contrary to the Federal aviation statutes and conflict in principle with the position of three courts of appeals and well-established principles of Federal aviation law. Additionally, the Court of Appeals holdings that violations of the Federal aviation laws by a municipality are not cognizable under 42 U.S.C. § 1983, and that the Airport and Airway Improvement Act of 1982 does not permit a private action, are in error.

If permitted to stand, the decision will have a serious deleterious effect on the national air transportation system, conflict with the ability of the FAA to administer the Federal aviation laws and detract from its ability to fulfill its role in air safety, and deny air carriers a vital opportunity to redress violations of the Federal aviation laws.[17] The issues in this case are clearly of national scope and importance. Moreover, because of the interstate nature of air carrier service, there is a pressing need for a uniform Federal judicial position on these issues. Resolution of these matters assumes increasing importance in light of the virtual explosion of attempts

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Aviation Act and does not violate the Commerce Clause, U.S. Const., art. I, § 8, cl. 3. *See also infra* nn.35, 36.

[17] *Infra* 19-20; *see City of Dallas v. Southwest Airlines Co., infra*, 15, 371 F. Supp. at 1033 n.12; *Airline Deregulation, supra* n.5, at 322, 332-33.

by airports to use their proprietary powers to restrict access as demonstrated by the FAA's current proceeding to develop a national policy on airport access restrictions.[18]

II. The Town's Conduct, and the New York Statute Upon Which It Relies, Are Preempted by Federal Law.

A. *Introduction.*

The Second Circuit sustained the Eastern District's dismissal of MCA's antitrust claims on the grounds that the Town's conduct was immunized from antitrust liability by the state action doctrine, most recently articulated in *Town of Hallie v. City of Eau Claire*, —— U.S. ——, 105 S. Ct. 1713 (1985). An essential requirement of that doctrine is that the municipality establish that its anticompetitive conduct is authorized by state policy, and that the state legislature intended the anticompetitive consequences of that policy. *Hallie*, 105 S. Ct. at 1716, 1719.

In that regard, the Second Circuit examined N.Y. Gen. Mun. Law §§ 350-357 (McKinney 1974 and Supp. 1984-85), which authorize a local government to own and operate an airport. Section 352 of that law provides in pertinent part that the local government operating the airport may:

> 5. Lease, or sublease the real property or lease, contract or otherwise agree, on an *exclusive* or nonexclusive basis, for the entire operation of such airport or landing field, or a part thereof, or for the rendering of various services or conduct of business activities, on or at said airport or landing field. (Emphasis added).

The Second Circuit found that Section 352:

> [D]eclares a state policy that municipal airport operators may enter into exclusive lease arrangements. This effectively replaces competition with regulation. We therefore must assume that the New

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[18] 51 Fed. Reg. 2985 (January 22, 1986); *see Airline Deregulation, supra* n.5, at 326-34, 338 n.113.

> York legislature contemplated the kind of anticompetitive activity in which the Town of East Hampton has engaged.[19]

Based on that finding the Court of Appeals held that the state action test of *Hallie* had been met and affirmed the dismissal of the antitrust claims.[20]

Irrespective of whether MCA stated an antitrust claim, the Second Circuit's holding that Federal law does not preempt the Town's conduct, or the New York statute, seriously errs. The New York law, and the Town's use of it, directly conflict with Section 105(a)(1) of the Federal Aviation Act of 1958, as amended ("the Federal Aviation Act"), 49 U.S.C. § 1305(a)(1). Moreover, Section 308(a) of the Act, 49 U.S.C. § 1349(a), and Section 511(a) of the AAIA, 49 U.S.C. App. § 2210(a), expressly bar certain aspects of the Town's conduct and preempt the New York law.

B. *Preemption Under Section 105(a)(1) of the Federal Aviation Act.*

MCA raised the preemption issue by arguing that Section 352 of the New York law had been preempted by Section 105(a)(1) of the Federal Aviation Act, 49 U.S.C. § 1305(a)(1); however, the Second Circuit rejected that position, concluding that the Town's exclusive lease arrangements with EHA were a valid exercise of the Town's proprietary rights that are excepted from preemption by Section 105(b)(1) of the Federal Aviation Act, 49 U.S.C. § 1305(b)(1).[21]

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[19] Petitioner's brief at 39a-40a (Appendix D); 784 F.2d at 96. Significantly, Section 352 was enacted in 1948, well before enactment of the Federal Aviation Act in 1958, or the AAIA in 1982. Thus, in enacting Section 352 the New York legislature could not have contemplated the limitations imposed by the subsequent Federal aviation laws.

[20] *Id.* at 41a; 784 F.2d at 96.

[21] Petitioner's brief at 40a-41a (Appendix D); 784 F.2d at 97.

The Second Circuit's holding clearly errs as it fails to recognize that Section 105(a)(1) precludes a state or local government from enacting or enforcing:

> any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act to provide air transportation.

MCA's allegations fall within the ambit of Section 105 (a)(1) as the Town previously precluded MCA's services during the off-season and will do so again at the end of this summer season (with the apparent exception of landings and take-offs). Thus, the Town's conduct violates Section 105(a)(1) because its refusal to end its off-season exclusive lease arrangements with EHA, and its refusal to permit MCA to service its own passengers and aircraft year-round, have the direct effect of relating to or regulating MCA's rates, routes or services as those actions (1) are designed to place MCA's services at a competitive disadvantage during th seven-month off-season thereby favoring the rates, routes and services of other carriers, (2) deny it access to airport facilities and prevent it from providing passenger services that are necessary for it to serve the Airport, and (3) implicitly, raise MCA's rates through discrimination against it.[22] MCA states that the Town has never advanced any basis for its efforts to exclude MCA, and it cites the preferential airport arrangements that EHA has enjoyed as evidence that the Town's actions against MCA are designed to benefit EHA.[23]

Assuming MCA's allegations to be true, the use of proprietary powers to achieve such goals is precluded by the express terms of Section 105(a)(1). Yet, it is apparently the view of the Second Circuit that a proprietary power or right recognized under Section 105(b)(1)

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[22] Petitioner's brief at 5, 19-20.

[23] Petitioner's brief at 19-20.

of the Federal Aviation Act, 49 U.S.C. § 1305(b)(1), is not preempted by Section 105(a)(1), even though the proprietary power or right is exercised for the purposes of directly and materially affecting an air carrier's rates, routes or services.[24] The result of that reasoning is that Section 105(b)(1) overrides Section 105(a)(1), thereby permitting airports throughout the Second Circuit to influence, if not regulate, air carrier rates, routes or services under the rationale that the airport is only exercising its proprietary right to lease or contract. For example, under the authority of the Second Circuit's decision, airports could condition leases on a carrier's agreement to serve, or not serve, certain routes, or to limit the number of flights or the services provided to passengers.

The Second Circuit's position is erroneous. Nothing in the legislative history of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, 1708 (1978), of which Section 105 was part, suggests that Section 105(b)(1) should prevail over Section 105(a)(1). Such a reading violates basic principles of statutory construction, as it results in Congress taking away by Section 105(b)(1), preemption that it expressly provided for in Section 105(a)(1), thus impliedly repealing Section 105(a)(1). Indeed, such an outcome would be contrary to the entire purpose of the Airline Deregulation Act of 1978, which was intended to permit the market place,

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[24] The Town's direct attempt to affect MCA's rates, routes or services is one of several factors distinguishing this case from *Wardair Canada, Inc. v. Florida Dep't of Revenue, supra* n.16. The aviation fuel tax in *Wardair*, permissible under Section 1113(b) of the Federal Aviation Act, 49 U.S.C. § 1513(b), was clearly not a tax on the items enumerated in Section 1113(a), 49 U.S.C. § 1513(a), that are preempted from state taxation. By contrast, in this case the Town is alleged to have used its proprietary powers recognized under Section 105(b)(1) of the Federal Aviation Act, 49 U.S.C. § 1305(b)(1), to accomplish a goal that is specifically preempted in Section 105(a)(1) of that Act, 49 U.S.C. § 1305(a)(1).

not the Federal or local governments, to determine which and how many air carriers should serve a given airport, over what routes and at what fares.[25]

In short, whatever "proprietary powers and rights" may mean, they clearly do not include any power relating to the rates, routes or services of air carriers.[26] Such local regulation is no less onerous or unlawful because it comes in the subtle form of proprietary rights, rather than in the form of direct regulation.[27] Accordingly, as the Town's proprietary powers and rights are limited by Section 105(a)(1), to the extent their exercise conflicts directly with Federal law, they are unlawful under the Supremacy Clause, U.S. Const., art. VI, cl. 2. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, *reh'g denied*, 431 U.S. 925 (1977).

If the Second Circuit's broad interpretation of proprietary rights under Section 105(b)(1) is permitted to stand, there can be little doubt that it will be readily seized upon as authority for a radical expansion of airport proprietary powers and rights. Local airports, many already under pressure by surrounding communi-

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[25] H.R. Rep. No. 95-1779, 95th Cong., 2d Sess. 56 (1978).

[26] 14 C.F.R. § 399.110(d) (1986) (Civil Aeronautics Board ("the CAB") (now Department of Transportation) general policy statement providing that state actions governing flight frequency and mode of operations are preempted); § 399.110(e) (proprietary powers must be exercised as to be nondiscriminatory, nonburdensome to interstate commerce, and designed to further legitimate state goals that do not conflict with federal law). In PS-83, 44 Fed. Reg. 9948 (February 15, 1979), promulgating 14 C.F.R. § 399.110, the CAB noted that states may not interfere with carrier decisions concerning prices and markets, and that Section 105 of the Federal Aviation Act is designed to prevent states from frustrating the benefits of federal deregulation. *Id.* at pp. 9949, 9951.

[27] *See Hingson v. Pacific Southwest Airlines, Inc.*, 743 F.2d 1408 (9th Cir. 1984) (Section 105(a)(1) preempts local laws *relating to* air carrier rates, routes or services, not just local laws *conflicting with* Federal law; therefore, California handicapped access rules are not applicable to interstate air carrier).

ties to reduce air carrier operations, could hardly resist such an expansion. Moreover, as the Court of Appeals decision substantially increases an airport's bargaining power in lease negotiations, airport operators will have a financial interest in expanding their proprietary powers. The national air transportation system will ultimately be severely affected. Economic air carrier scheduling would become virtually impossible as local concerns, not the market, would dictate service. Moreover, the FAA's very ability to manage the airways would be threatened by the innumerable local regulations and operating conditions with which it would have to deal.

C. *Preemption Under Section 308(a) of the Federal Aviation Act and Section 511(a) of the AAIA.*

The Town's conduct at issue here, and the New York statute, are further preempted and invalidated by Section 308(a) of the Federal Aviation Act, 49 U.S.C. § 1349(a), which expressly prohibits exclusive use rights at any federally-funded airport:

> There shall be no exclusive right for the use of any landing area or air navigation facility upon which federal funds have been expended.[28]

Additionally, Section 511(a)(2) of the AAIA, 49 U.S.C. App. § 2210(a)(2), provides that all Federal grants to airports shall include a requirement that:

> [T]here shall be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public.[29]

That proprietary powers and rights recognized under Section 105(b)(1) of the Federal Aviation Act, 49 U.S.C. § 1305(b)(1), are subject to these provisions is apparent

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[28] The Airport receives Federal funds. Petitioner's brief at 3a (Exhibit A, para. 10).

[29] The Airport is specifically bound to meet the requirements of Section 511(a) by Assurance 20 of its Grant Agreement, dated September 29, 1983. *Id.*; petitioner's brief at 50a (Appendix G); *see* 14 C.F.R. Pt. 152, Appendix D, paras. II.A.19 and 20 (with reference to predecessor of AAIA).

from Section 105(b)(1)'s legislative history. Senator Cannon, the Senate floor manager of the Airline Deregulation Act of 1978, of which Section 105 was a part, stated concerning Section 105:

> It was not the intent of the Senate conferees to limit in anyway the normal exercise of the existing proprietors' powers to place *nondiscriminatory* restrictions on the operations of an airport, *subject to constitutional and statutory limitations.* (Emphasis added).[30]

Accordingly, Section 352, and the conduct it authorizes, are facially preempted by federal law and are invalid. *Gibbons v. Ogden; Jones v. Rath Packing Co.*[31]

Even if Section 352 of the New York law and the Town's conduct were not facially preempted, it is clear that the Town is required to comply with Section 511(a) of the AAIA, 49 U.S.C. App. § 2210(a), by virtue of its acceptance of Federal funds for its airport.[32] It has therefore waived any claim to proprietary powers or rights that would violate Section 511(a).[33]

MCA's allegations against the Town, if proven, represent significant violations of the Federal statute and corresponding grant assurances. For example, prohibiting MCA from providing its own passenger-related services and from servicing its own aircraft during the seven-month off-season, while permitting EHA to perform those services for itself and other air carriers, patently violates

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[30] 124 Cong. Rec. 37419 (1978).

[31] The issue of preemption under Sections 308(a) and 511(a) was implicitly addressed by the Second Circuit as it concluded that no authority bars the Town's conduct here at issue, and that conclusion was necessary to its finding that Section 105(a)(1) did not preempt the Town's conduct and the New York statute. Petitioner's brief at 41a (Appendix D); 784 F.2d at 97.

[32] *United States v. Westchester County, infra* n.35, 571 F. Supp. at 798.

[33] *United States v. State of New York, infra* n.35, 552 F. Supp. at 265.

the equal access and non-discrimination requirements of Section 511(a)(1)(A).

More important, the Town's previous and impending refusals to permit MCA to service its own aircraft directly contravenes Section 511(a)(1)(C) of the AAIA, 49 U.S.C. App. § 511(a)(1)(C), which states that "each air carrier using such airport shall have the right to service itself. . . ." Significantly, the Section 511(a)(1)(C) right of an air carrier to service its own aircraft is guaranteed irrespective of whether MCA is being subjected to discrimination by the Airport; that right exists even if there were no other air carriers serving the Airport. Accordingly, MCA's rights under Section 511(a)(1)(C) have been violated in this case even without consideration of the preferences granted to EHA.[24]

D. *The Decision Conflicts In Principle With Other Circuits and Well-Established Legal Principles.*

The Second Circuit's decision, to the extent that it holds that the Town's conduct does not violate Section 308(a) of the Federal Aviation Act, 49 U.S.C. § 1349(a), conflicts in principle with the decision of the Eleventh Circuit in *City of Pompano Beach v. FAA*, 774 F.2d 1529 (11th Cir. 1985) (affirming FAA order that exclusive FBO leases violate Section 308(a)), and a decision affirmed by the Sixth Circuit, *Niswonger v. American Aviation, Inc.*, 411 F. Supp. 769 (E.D. Tenn.), *aff'd without op.*, 529 F.2d 526 (6th Cir. 1975) (exclusive FBO lease violates Section 308(a)). The decision in this case also conflicts, with respect to Section 511(a) of the AAIA, 49 U.S.C. App. § 2210(a), with a decision affirmed by the Fifth Circuit, *City of Dallas v. Southwest Airlines Co.*, 371 F. Supp. 1015 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir. 1974), *cert. denied*, 419 U.S. 1079 (1974), *reh'g denied*, 420 U.S. 913 (1975) (city's requirement

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[24] Prohibiting MCA from operating an FBO during the seven-month off-season also violates Section 511(a)(2) of the AAIA, which prohibits exclusive FBOs, absent special circumstances that have not been demonstrated so far in this case.

that intrastate airline move to new terminal, while permitting air taxis to remain at old terminal, constitutes unjust discrimination in violation of 49 U.S.C. App. § 1718(a) (repealed by the AAIA), the predecessor of Section 511(a)). *See also New York Airlines, Inc. v. Dukes County*, 623 F. Supp. 1435 (D. Mass. 1985).

The Second Circuit's expansive view that an airport operator's proprietor powers and rights may be exercised unfettered by the requirements of the Federal aviation laws further conflicts with well-established legal principles, often recognized by the Second Circuit in the context of airport noise regulation, that airport proprietor rights must be exercised reasonably, in a nondiscriminatory manner, and with due regard for Federal administration of the airways.[35] Indeed, even those decisions that have sustained a proprietor imposed noise restriction, relying on the possibility of a "proprietor exception" to Federal preemption alluded to in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635 n.14 (1973), have done so only after the airport demonstrated that the local regulation was reasonable, nondiscriminatory and

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[35] *British Airways Board v. Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977) (noise regulation must be reasonable, nonarbitrary and nondiscriminatory and limited to establishing noise levels for the airport and immediate environs, relying on Supremacy and Commerce Clauses and predecessor of Section 511, AAIA); *British Airways Board v. Port Authority of New York*, 564 F.2d 1002 (2d Cir. 1977) (proprietor's regulation of airport noise held invalid because not "reasonable, non-arbitrary and nondiscriminatory"); *United States v. Westchester County*, 571 F. Supp. 786 (S.D.N.Y. 1983) (curfew imposed by proprietor violates Commerce Clause, is preempted and is unreasonable and arbitrary); *United States v. State of New York*, 552 F. Supp. 255 (N.D.N.Y. 1982), *aff'd*, 708 F.2d 92 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) (curfew imposed by proprietor violates Supremacy Clause because it is (1) preempted by Federal law, and (2) directly conflicts with provisions of predecessor of AAIA); *San Diego Unified Port District v. Superior Court*, 136 Cal. Rptr. 551 (Cal. Ct. App. 4th Dist. 1977), *cert. denied sub nom. Britt v. San Diego Unified Port District*, 434 U.S. 859 (1977) (curfew imposed by proprietor held preempted by Federal law).

did not conflict with Federal law.[36] Because the trial court's dismissal of this case on a Fed. R. Civ. P. 12(b)(6) motion was affirmed, the Town was improperly spared from making such a showing.

E. Review is Warranted; However, Remand May Be Appropriate.

Although review of this case is warranted so that these important Federal issues may be settled, the RAA recognizes that the Second Circuit may simply have not appreciated the significance of Section 308(a) of the Federal Aviation Act, 49 U.S.C. § 1349(a), and Section 511 (a) of the AAIA, 49 U.S.C. App. § 2210(a), or of its holding that proprietary powers and rights recognized under Section 105(b)(1) of the Federal Aviation Act are not limited by Section 105(a)(1) of that Act, 49 U.S.C. §§ 1305(a)(1) and (b)(1). The RAA submits that it may be more appropriate for this Court to vacate the Second Circuit's decision and remand the case with instructions to reconsider in light of the above. Upon reconsideration, the Second Circuit may well obviate the need for review by this Court.

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[36] *Arrow Air, Inc. v. Port Authority of New York*, 602 F. Supp. 314 (S.D.N.Y. 1985) (Arrow obtained a waiver from FAA noise regulations, but not from similar local regulations, held, local regulations not preempted, discriminatory, unreasonable or an undue burden on commerce); *Global International Airways Corp. v. Port Authority of New York*, 727 F.2d 246 (2d Cir.), *reh'g denied*, 731 F.2d 127 (2d Cir. 1984) (proprietor imposed requirement of accelerated compliance with 14 C.F.R. Pt. 36 not facially preempted, case remanded for factual determination of whether, on airline-by-airline basis, local regulation, in itself or in combination with other regulations, actually caused each airline to accelerate compliance with Part 36 or caused undue hardship; if so, injunction to be granted against enforcement of the regulation); *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981) (proprietor imposed noise regulation held reasonable and not preempted); *National Aviation v. City of Hayward*, 418 F. Supp. 417 (N.D. Cal. 1976) (curfew imposed by proprietor on aircraft in excess of 75 dBA not preempted nor undue burden on interstate commerce, nor in violation of Federal grants).

III. The Provisions of Section 511(a) of the AAIA Are Enforceable Under 42 U.S.C. § 1983 or in a Private Action by an Air Carrier.

The RAA concurs with the analysis provided in petitioner's brief demonstrating that MCA may sustain a claim under 42 U.S.C. § 1983 for the Town's violations of Section 511(a) of the AAIA, 49 U.S.C. App. § 2210 (a), and that a private action may be brought under Section 511(a) itself. Additionally, the RAA would invite the Court's particular attention to *New York Airlines, Inc. v. Dukes County*, 623 F. Supp. at 1443-48, in which Judge Wolf presents a particularly cogent discussion establishing that violations of Section 511(a) are cognizable under 42 U.S.C. § 1983.[37] The RAA would also add several points to petitioner's discussion of these matters.

First, additional evidence that air carriers are intended and primary beneficiaries of Section 511(a)'s nondiscrimination provisions is seen in Section 511(a)(1)(A), 49 U.S.C. App. § 2210(a)(1)(A), which provides that tenant status will not be unreasonably withheld by an airport from an air carrier, and in Section 511(a)(1)(C), *id.* at § 2210(a)(1)(C), which provides that each air carrier shall have the right to service itself or use an FBO at the airport. Air carriers are the only possible direct and primary beneficiaries of those protections.[38]

Second, the crux of the Second Circuit's decision that 42 U.S.C. § 1983 may not be used with respect to Section 511(a) of the AAIA is that the "comprehensive enforcement" scheme of the Federal Aviation Act manifests a congressional intent to foreclose an action under Section 1983.[39] The Second Circuit evidently misunderstood the Federal aviation laws because precisely the opposite is

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[37] *But see The Interface Group, Inc. v. Massachusetts Port Authority*, 631 F. Supp. 483 (D. Mass. 1986).

[38] MCA alleged violations of Section 511(a) in its Complaint, but sought no relief thereunder. Nonetheless, the Eastern District entered findings dismissing that claim, thereby preserving the issue for review by this Court. Petitioner's brief at 29a (Appendix C).

[39] Petitioner's brief at 43a (Appendix D); 784 F.2d at 96-97.

the case. Section 511(a) is part of the AAIA, not the Federal Aviation Act; thus, the criminal and civil penalties of the Federal Aviation Act are not available to enforce violations of Section 511(a) of the AAIA.

By contrast, Congress expressly provided that the extensive investigation powers available under the Federal Aviation Act would be available under the AAIA. Section 313(c) of the Federal Aviation Act, 49 U.S.C. § 1354(c); *see* 14 C.F.R. §§ 13.1 and 13.3 (with reference to the predecessor of the AAIA). The fact that Congress linked the two statutes for purposes of investigation, but not for purposes of enforcement, evinces that Congress consciously chose not to make the Federal Aviation Act's enforcement provisions available under the AAIA. Accordingly, as the Second Circuit's decision that relief is not available under 42 U.S.C. § 1983 is predicated upon the availability of the enforcement scheme of the Federal Aviation Act for AAIA violations, it errs.[40]

The RAA submits that violations of Section 511(a) should be cognizable under 42 U.S.C. § 1983, or in a private action. Absent such procedural avenues, air carriers will be unable to enforce the protections under Section 511(a) of which they are the direct and primary beneficiaries. *See United States v. Westchester County*, 571 F. Supp. at 798 (explaining irreparable injury flowing from airport curfew). As discussed *supra* n.40, the FAA's enforcement powers under the AAIA are limited and largely proscriptive. Moreover, the FAA cannot police the administration of these laws alone. It is unable to dedicate significant resources to these problems and consequently only takes an interest in the most significant cases, usually involving major airports or large carriers. This particularly affects the regional/commuter

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[40] Federal enforcement of the AAIA is limited to funding termination, breach of grant assurance action, or orders issued pursuant to Section 519 of the AAIA, 49 U.S.C. App. § 2218. *See City of Pompano Beach*, 774 F.2d at 1536, 1537-38; *United States v. Westchester County*, 571 F. Supp. at 798; *see also* 14 C.F.R. Pt. 152, Subpt. F (with reference to the predecessor of the AAIA).

carriers, which generally serve smaller airports in which the FAA has comparatively little interest in access matters.[41] Additionally, the FAA's expertise is not required to remedy violations of Section 511(a).

Should the FAA become the only forum for Section 511(a) violations, because judicial relief is unavailable to air carriers, the Agency will be overwhelmed by these matters, which can only detract from its primary mission of air safety. Moreover, administrative relief often takes years to obtain, as illustrated by *City of Pompano Beach* (complaint filed with FAA July 1981, FAA preliminary order issued March 1983, FAA final order issued February 1985, affirmed by Eleventh Circuit November 1985); thus, relief will come too late to prevent carriers from sustaining major losses while awaiting relief. In fact, significant monetary losses can and have occurred in such cases, and cannot be recouped. *See United States v. Westchester County*, 571 F. Supp. at 798. Without the availability of an action under 42 U.S.C. § 1983 or a private action under Section 511(a) itself, interim relief is virtually unobtainable, and whether the airport's violation is successfully challenged will largely depend on whether the air carrier can survive financially the burdens of the airport's unlawful conduct during the FAA's investigation and subsequent litigation. Congress certainly did not intend such an outcome in the enactment of the AAIA, and the case for finding a private action is compelling when, as here, the practical limitations on agency enforcement and the inadequacy of remedies will result in a frustration of Congressional purpose.[42]

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted and the case reviewed by this Court. Alternatively, the case should be vacated and remanded to the Second Circuit for reconsideration.

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[41] *See* PS-83, *supra* n.26, at 9949 (noting particular adverse effects of state regulation on commuter carriers and their comparative inability to challenge unlawful state conduct).

[42] *See J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

Respectfully submitted,

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